



December 13, 2010

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Written Ex Parte Presentation*
Preserving the Open Internet, GN Docket No. 09-191; Framework for Broadband
Internet Service, GN Docket No. 10-127

Dear Ms. Dortch:

Throughout the “net neutrality” debate, the Commission and numerous commenters have recognized that the current common sense regulatory approach to wireless broadband Internet access services has created a market dynamic that is delivering immeasurable benefits to consumers and the economy. Given the vibrantly competitive wireless marketplace and the “real and relevant differences” between wireline and wireless networks, Mobile Future continues to believe that Commission regulation of wireless broadband Internet access is inappropriate.¹ That said, Mobile Future is supportive of Chairman Julius Genachowski’s plan to move ahead with rules patterned after the compromise legislation proposed by Representatives Henry Waxman and Rick Boucher, *i.e.*, the Open Internet Act of 2010.² Compared to the more inflexible net neutrality proposals being advocated by some for wireless services, the Chairman’s proposed reasonable approach would be more consistent with spurring investment and innovation to bring the benefits of wireless broadband services to all Americans.

Wireless is a regulatory success story marked by competition, innovation and investment that is providing consumers with a wealth of service offerings, devices and applications. The vast majority of Americans have access to three or more facilities-based mobile broadband providers and this competition has created a wide-open marketplace in which consumers enjoy a remarkable and growing array of choices.³ Indeed, wireless consumers can choose among 630 unique handsets from at least 32 different manufacturers, 11 different operating systems, and more than 400,000

¹ Remarks of FCC Chairman Julius Genachowski, FCC, “America’s Mobile Broadband Future,” at International CTIA WIRELESS I.T. & Entertainment, San Diego, CA 7 (Oct. 7, 2009) (“Genachowski Speech”), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.pdf.

² See FCC Chairman Julius Genachowski Remarks on Preserving Internet Freedom and Openness, Washington DC, at 3 (Dec. 1, 2010) (“Genachowski Net Neutrality Statement”), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303136A1.pdf; Draft Open Internet Act of 2010 (attached to Letter from U.S. Rep. Henry Waxman, to Julius Genachowski, FCC, GN Docket No. 09-191 (Dec. 1, 2010) (“Open Internet Act of 2010”)).

³ Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, *Fourteenth Report*, 25 FCC Rcd 11407, 11450-51 ¶ 47 and Table 7 (2010) (“*Fourteenth Wireless Competition Report*”).

applications.⁴ And to support this abundance of handsets, operating systems and applications, U.S. wireless providers have “invested an average of more than \$20 billion annually in network infrastructure since 2006” – despite one of the worst recessions in decades.⁵ As Chairman Genachowski aptly described the wireless market, “[n]o sector of the communications industry holds greater potential to enhance America’s economic competitiveness, spur job creation, and improve the quality of our lives. . . . In an economy that certainly can use some pacesetters, we need this industry to continue driving economic growth and job creation.”⁶

At the same time, the Commission and many commenters have acknowledged that wireless providers face unique network management challenges.⁷ These challenges stem from the inherent complexities of using radio spectrum as a communications medium – mobility, interference, handset power limitations, unpredictable surges in users and usage at a given location and, perhaps most importantly, constraints on the amount of spectrum available for broadband services.⁸ Indeed, despite the substantial investment and technological advances in the wireless industry, wireless broadband services will always face far greater constraints on their physical capacity to transmit data than do wired broadband services.⁹ Wireless broadband Internet access services are also at an earlier stage of development – and are evolving more rapidly – than their wired counterparts.¹⁰ As the Chairman explained, “[i]n looking at wired and wireless Internet access,

⁴ See Reply Comments of Mobile Future, GN Docket No. 09-191, at 2 (filed Nov. 4, 2010) (“Mobile Future Reply Comments”); Letter from Christopher Guttman-McCabe, CTIA, to Marlene Dortch, FCC, GN Docket No. 09-191, Attachment (filed Nov. 16, 2010).

⁵ See MOBILE FUTURE, MOBILE MOMENTUM: HOW CONSUMER-DRIVEN COMPETITION SHAPES & DEFINES THE MODERN U.S. WIRELESS LANDSCAPE 15 (Nov. 2010) (attached to Mobile Future Reply Comments).

⁶ Genachowski Speech at 2, 3.

⁷ Genachowski Speech at 7; see also Genachowski Net Neutrality Statement (The record reflects “the appropriateness of recognizing differences between fixed and mobile broadband. This is not a new point, but one that I’ve made consistently since the beginning of this proceeding.”); Comments of Mobile Future, GN Docket No. 09-191, Attachment (filed Oct. 12, 2010) (“Mobile Future Oct. Comments”) (wireless network management white paper by Rysavy Research); Comments of Mobile Future, GN Docket No. 09-191, Attachment (filed Jan. 14, 2010) (“Mobile Future Comments”) (white paper on implications of regulatory proposals on wireless networks by Rysavy Research); Comments of AT&T, GN Docket No. 09-191, Exhibit 2 (filed Jan. 14, 2010) (expert declaration of Jeffrey Reed & Nishith Tripathi); Reply Comments of AT&T, GN Docket No. 09-191, Exhibit 1 (filed April 26, 2010) (“AT&T Reply Comments”) (expert reply declaration of Jeffrey Reed & Nishith Tripathi); Comments of Metro PCS, GN Docket No. 09-191, at 35-45 (filed Jan. 14, 2010); Comments of Verizon, GN Docket No. 09-191, Exhibit E (filed Jan. 14, 2010) (expert declaration of Michael Poling & Thomas Sawanobori); Comments of CTIA, GN Docket No. 09-191, Attachments 1 and 3 (filed Oct. 12, 2010) (handset white paper by Charles Jackson and network management white paper by Terasense, LLC).

⁸ Mobile Future agrees with Chairman Genachowski that the “looming spectrum crisis” that poses “the biggest threat to the future of mobile [broadband] in America.” Genachowski Speech at 4.

⁹ See RYSAVY RESEARCH, NET NEUTRALITY REGULATORY PROPOSALS: OPERATIONAL AND ENGINEERING IMPLICATIONS FOR WIRELESS NETWORKS AND THE CONSUMERS THEY SERVICE, 10 (Jan. 14, 2010) (attached to Mobile Future Comments) (“The fundamental source of the discrepancy between wired and wireless capacity is that fiber-optic capacity is so much greater than RF capacity. In fact, one strand of fiber-optic cable has greater capacity than the entire RF spectrum.”).

¹⁰ See *supra* note 7.

some have said that ‘one size doesn’t fit all.’ I agree. We know from experience at the FCC that there are real and relevant differences between wired and wireless.”¹¹

In recognition that wireless is inherently different, the Open Internet Act of 2010 proposed to take a more flexible approach with wireless broadband Internet access services than with wireline access services.¹² The different treatment reflects an appreciation of the still-evolving nature of wireless broadband technology and the many critical network management concerns raised by wireless engineering experts in the record here, while incorporating key open Internet requirements.¹³ In that regard, the proposed legislation prohibits wireless providers from blocking lawful websites, which has long been a fundamental concern of net neutrality advocates.¹⁴ It also prohibits wireless providers from blocking certain categories of applications that the drafters and many net neutrality proponents viewed as raising particular anti-competitive concerns related to wireless providers’ alleged incentives to protect their pre-existing lines of business.¹⁵

Yet at the same time, the proposed legislation eschewed certain proposals that would have had the most significant negative impact on investment and innovation, and the ability of wireless providers to manage their networks and maintain high service quality. For example, the legislation contains definitions that focused on the core service at issue in the net neutrality debate – broadband Internet access service – without precipitously throwing a smothering blanket of regulation over a wide range of other nascent, limited-use products and services that merely incorporate some level of Internet connectivity, such as eReaders, smart utility meters, wireless medical monitoring devices, broadband-enabled GPS navigation devices, Internet-connected vending machines, wireless dog tracking collars and the like. In a similar vein, the proposed legislation’s prohibition on blocking only certain types of applications is tailored so as not to prevent wireless providers from taking action to address other applications that, while perhaps not “unlawful,” could nonetheless have serious negative consequences for consumers’ wireless experiences.¹⁶

¹¹ Genachowski Speech at 7 (“Communications technologies are complex and changing rapidly, nowhere more than mobile, and my time in business has convinced me that the last thing we want is heavy-handed and prescriptive regulation. Our goal is to empower innovators, not lawyers.”).

¹² See Open Internet Act of 2010 § 2.

¹³ See *supra* note 7.

¹⁴ See Open Internet Act of 2010 § 2.

¹⁵ *Id.*

¹⁶ Thus, the legislation addressed some of the most significant concerns raised in the record before the Commission, *e.g.*, applications that harm users by consuming excessive amounts of network resources or put personal user data in jeopardy. See, *e.g.*, T-Mobile Comments, GN Docket No. 09-191, Declaration of Grant Castle at 4 (Jan. 14, 2010) (describing Android-based instant messaging application that was designed to refresh its network connection with substantial frequency, resulting in network degradation due to massive increases in signaling traffic that caused a severe overload at certainly densely populated network nodes; noting that network utilization by one device increased by 1,200% from this one application alone); Comments of AT&T, GN Docket No. 09-191, at 65 (filed Oct. 12, 2010) (“AT&T Comments”) (discussing “seemingly innocuous wallpaper applications available in the Android Market that was actually designed to acquire and transmit personal user data, such as phone numbers and SIM card serial numbers, to a Chinese-operated server”); see also *id.* at 62-63 (explaining that an after-the-fact “reasonable network management” exception does not provide wireless network operators with sufficient flexibility to address the numerous challenges they face).

The proposed legislation also recognized that in light of the low barriers to entry and the multitude of competing wireless application stores accessible to consumers on the Internet today – including the many stores created by device manufacturers, operating system providers, network operators and independent application vendors¹⁷ – intrusive regulation is not needed to micromanage the operation of application stores operated by wireless broadband providers. In this respect, the legislation confirms the Commission’s own findings about the marketplace for wireless applications. As the Commission observed earlier this year: “Thousands of niche applications, each serving a unique purpose, have been designed for specific uses, hobbies, interests, and industries by various third-party application developers.”¹⁸ These applications are “available to consumers through various channels. They may be accessed through web browsers, operating system application stores, or service provided-branded platforms. In addition, certain applications may be native to, or pre-loaded on, a device, or may be side-loaded from a PC.”¹⁹

The Commission should reject suggestions to abandon this common sense approach and to instead apply the full panoply of proposed wireline regulations to wireless broadband services as well.²⁰ As the record shows, treating wireless like wireline would raise serious technical concerns and have negative consequences for consumers.²¹ And the existing, lightly regulated (yet intensely competitive) wireless broadband marketplace is delivering tremendous benefits to consumers – jobs, investment, and innovation – and the still-fragile economy. The Commission should therefore dismiss calls for more prescriptive requirements beyond what is envisioned in the Open Internet Act of 2010 that would alter the robust and positive trajectory of the wireless broadband sector. As a recent report by network engineer Peter Rysavy for Rysavy Research correctly concluded, “[w]hile the future of [the wireless] industry looks promising, it can only achieve its true potential if operators are able to effectively manage their networks.”²²

¹⁷ See Comments of Mobile Future, WT Docket No. 10-133, at 4-5 (filed July 31, 2010).

¹⁸ *Fourteenth Wireless Competition Report*, 25 FCC Rcd at 11596-97 ¶ 321.

¹⁹ *Id.* at 11596 ¶ 319.

²⁰ See Comment of Free Press, GN Docket No. 09-191, at 19 (filed Oct. 12, 2010); Comments of Public Interest Commenters, GN Docket No. 09-191, at 12 (filed Oct. 12, 2010); Letter from Joel Kelsey, Free Press, to Marlene Dortch, FCC, GN Docket No. 09-191 (Dec. 3, 2010).

²¹ See RYSAVY RESEARCH, NET NEUTRALITY REGULATORY PROPOSALS: OPERATIONAL AND ENGINEERING IMPLICATIONS FOR WIRELESS NETWORKS AND THE CONSUMERS THEY SERVICE (Jan. 14, 2010) (attached to Mobile Future Comments); see also *supra* note 7.

²² RYSAVY RESEARCH, INNOVATION ENABLED BY MOBILE WIRELESS NETWORK MANAGEMENT, 9 (Oct. 12, 2010) (attached to Mobile Future Oct. Comments).

Ms. Marlene H. Dortch
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Pursuant to section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is being filed electronically with the Commission.

Sincerely,

A handwritten signature in black ink, reading "Jonathan Spalter". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Jonathan Spalter, Chairman
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